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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion and order of the district court (App. A, *infra*, pp. 26-61; 1971 Trade Cases ¶ 73,651) is reported at 329 F. Supp 1003.

JURISDICTION

The memorandum opinion and order of the district court was filed on July 12, 1971. On August 27, 1971, the district court entered an order denying plaintiff's timely motion, under F. R. Civ. P. 52(b) and 59, to

reopen the record, to obtain additional findings of fact and conclusions of law, and to obtain the relief requested in the complaint (App. B, *infra*, p. 62). A notice of appeal to this Court was filed on September 24, 1971 (App. C, *infra*, p. 63). The jurisdiction of the Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Phillipsburg National Bank*, 399 U.S. 350; *United States* v. *Third National Bank in Nashville*, 390 U.S. 171.

QUESTIONS PRESENTED

1. Whether acquisition of a leading bank in a concentrated local market in Colorado by one of the largest holding companies in the state violates Section 7 of the Clayton Act by eliminating the potential competition of the acquiring firm and by contributing to the statewide trend toward domination of commercial banking by a few large holding companies.

2. Whether acquisition of the second largest bank in Greeley, Colorado, by the second largest bank holding company based in Denver, Colorado, may substantially lessen competition among Denver banks offering correspondent banking services to Colorado "country banks" by contributing to the trend toward foreclosure of such services in the state.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall ac-

quire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 3(c) of the Bank Holding Company Act of 1956, 70 Stat. 134, as amended, 80 Stat. 237, 12 U.S.C. 1842(c), provides in pertinent part:

The [Federal Reserve] Board shall not approve—

* * *

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint or* trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

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* So in original.

STATEMENT

This is a direct appeal from the judgment of the United States District Court for the District of Colorado, dismissing a complaint by the United States seeking to enjoin the acquisition by the second largest bank holding company in the State of Colorado, First National Bancorporation ("Bancorporation"), of The First National Bank of Greeley ("FNB Greeley"), the second largest commercial bank in Greeley, Colorado, as being in violation of Section 7 of the Clayton Act.

A. *The Structure of Banking in Colorado*

The banking, commercial and financial center of Colorado is located in the state capital at Denver; there are, however, significant banking markets in other population centers of the state, including Greeley, Colorado Springs, Boulder, Ft. Collins and Pueblo.

By statute,[1] Colorado does not permit banking corporations to operate branches. Consequently, the leading Colorado banks have recently begun to form holding companies in an effort to bring local banks across the state under uniform control. In 1960, one out-of-state holding company, Western Bancorporation,[2] operated 3 subsidiary banks in Colorado which accounted for 4.4 percent of total Colorado deposits. By 1970, there were seven holding companies in Colorado; together, they operated 41 subsidiary banks

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[1] Colo. Rev. Stat. 1963 § 14-3-1 (1969).

[2] As an out-of-state holding company, Western Bancorporation is now barred from further expansion in Colorado. 12 U.S.C. 1842(d).

(App. A, *infra*, p. 35), including 13[3] of the 27 banks outside of Denver having total deposits in excess of $20 million (PX 125).[4] While this gave these seven companies ownership of less than one-fifth of all Colorado banks, their share of total deposits for the state had increased by 1970 to 51 percent.[5] As a result, although the absolute number of banks and banking organizations in Colorado increased during this ten-year period (DX 28), the decided trend has been toward control by a few large holding companies of the leading banks in local market areas.[6]

B. The Acquiring Holding Company

Bancorporation, a registered bank holding company, was organized by the state's largest bank, First National Bank of Denver ("FNB Denver"), to combine FNB Denver with its three smaller affiliates in the Denver area (PX 3, Preface). In June 1970, Bancorpo-

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[3] This includes the recent acquisition of National State Bank of Boulder by Bancorporation.

[4] "PX" references are to plaintiff's exhibits introduced in the district court; "DX" references are to defendants' exhibits introduced in the district court; "Tr." references are to the transcript of proceedings below.

[5] Computed from PX 115 and DX 28.

[6] The largest holding company in the State, United Banks of Colorado, Inc., abandoned plans to acquire the third largest bank in Colorado Springs because the purchase agreement expired during the period that the government's suit to enjoin its consummation was pending (Tr., Aug. 9, 1971, pp. 30-31). Bancorporation has unsuccessfully attempted to acquire two other local market leaders, and litigation is pending as to a third. See n. 7, *infra*. The banks it sought to acquire in Pueblo and Colorado Springs are now the largest banks in a proposal to form a new five-bank holding company (Tr., Aug. 9, 1971, pp. 23-28).

ration's lead bank, FNB Denver, had total deposits of $468.0 million (12.3 percent of total deposits held by Colorado commercial banks); it had total assets of $586.5 million, and loans and discounts of $340.8 million (App. A, *infra*, pp. 29-30). Moreover, FNB Denver is one of only six Denver banks offering a full range of correspondent banking services to smaller Colorado banks. As of August 1970, its share of Colorado interbank deposits held by these six banks was in excess of 37 percent, as compared to approximately 23 percent held by each of its two nearest rivals (PX 204, 205; Tr. 670).

At the time of its organization, Bancorporation stated in its first annual report (PX 3, Preface):

> The policy of our company is to expand as rapidly and as wisely as possible through the acquisition of other banks in Colorado (preferably banks in those growth areas where Bancorporation may make the most significant contribution to Colorado's economy and concurrently generate the highest profits for its shareholders) and through other legally permissible investments and activities.

The proposed Bancorporation acquisition of FNB Greeley is the first of six applications the holding company filed with regulatory authorities from 1969 to 1971 to acquire important banks in various Colorado local banking markets; it is continuing to explore other possibilities.[7] The six applications involved banks with total deposits of $217.2 million (DX 1).

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[7] The Federal Reserve Board denied Bancorporation's applications to acquire the largest bank in Pueblo, Colorado (DX 49), and

C. *The Local Geographic Market*

The banking market in which the acquisition involved here is to take place is the so-called "Greeley rea," consisting of the City of Greeley, Colorado, and djacent communities (App. A, *infra,* pp. 32, 43-47).[8] reeley is located 50 miles north of Denver in Weld ounty; it is the county seat (App. A, *infra,* p. 29). he Greeley Area is presently undergoing rapid and pansive development; in the past decade it has grown bstantially, while the entire economy of Weld County as experienced a healthy diversification (Tr. 257-8).[9]

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e only bank in the rapidly expanding Montbello section of Den-r (DX 52). The Board approved acquisition of the second largest nks in Colorado Springs (DX 54) and Boulder, respectively (*In e Matter of the First National Bancorporation, Inc.,* FRB Order, ne 17, 1971) and the largest bank in Sterling (DX 51). The lorado Springs acquisition was blocked by the statutory stay sulting from the filing of a civil antitrust action by the United ates. The government did not oppose the Boulder acquisition, hich involved a bank with serious financial difficulties. The gov-nment has challenged the Sterling acquisition (*United States* v. *rst National Bancorporation, Inc. and the Security State Bank of erling,* D. Col., C-2754, filed Dec. 2, 1970). Bancorporation has her proposed acquisitions under active consideration (PX 241; e also PX 4, p. 21; PX 6, pp. 10-14; Tr. 745).

[8] This includes neighboring Evans, LaSalle, Peckham, Kersey, ll, Eaton, Lucerne, Farmers and Bracewell (App. A, *infra,* p. 47). trial the government argued that both the City of Greeley and e Greeley Area are appropriate markets in which to test the mar-t extension aspects of this acquisition.

[9] Between 1950 and 1968, farm earnings dropped from 49.2 per-nt to 28.3 percent of total personal income in Weld County. In the ne period, earnings from manufacturing increased from 4.1 per-nt to 11.1 percent. (App. A, *infra,* p. 34, n. 4; PX 104). This curred during a period in which Weld County remained among e nation's top ten agricultural counties (App. A, *infra,* p. 34, 4).

The population of the Greeley Area increased from 45,228 to 58,500 between 1960 and 1970, an increase of 29.3 percent (PX 98). Most of this increase occurred within the City of Greeley, where the expansion was 47.8 percent (PX 88). Economic growth during the period was even more significant. For example, the consumption of electric power and of natural gas increased 115.8 percent (PX 101), and 127.3 percent (PX 100), respectively; and the number of main telephones went up 48.2 percent (PX 99). Retail sales for Greeley—which is Weld County's trade and government center—were up 97.1 percent (PX 91), while gross sales soared 281.8 percent (PX 90). Moreover, personal income in Weld County rose from $119.5 million in 1959 to $212 million in 1968 (PX 103).[10]

D. *The Acquired Bank and the Structure of Banking in Greeley*

Within the Greeley Area, six separate banking organizations operate eight banking offices of varying size. The acquired bank, FNB Greeley, is the community's largest independent bank, and its second largest banking organization (App. A, *infra,* pp. 32, 48). It has total deposits of $39.2 million, constituting 33.9 percent of the total deposits for the city, and 31.8 percent of the total deposits for the Greeley Area (App. A, *infra,* p. 32). Its total assets were $47.7 million, and its outstanding loans were $28.9 million, or 32.6 percent of the Greeley Area total (PX 73, 78).

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[10] Since three-fourths of Weld County's population growth is attributable to the City of Greeley (PX 88), presumably a similarly disproportionate share of the County's growth in personal income was earned by Greeley residents.

The largest banking organization in the Greeley Area is a holding company, Affiliated Bankshares of Colorado, Inc. ("ABC"); it owns three banking institutions there, the combined deposits of which total $49.6 million, or 40.2 percent of the total deposits for the area (App. A, *infra*, p. 33; PX 74). ABC's principal bank is almost the same size as the acquired bank (PX 73-86; Tr. 272-273, PX 114-118).

The third largest banking organization operating in the Greeley Area, the United Bank of Greeley ("United Bank"), is a subsidiary of Colorado's largest holding company, United Banks of Colorado, Inc. (PX 114-118). United Bank has $24.7 million in deposits, which are 21.4 percent of the total deposits for the city and 20 percent of the total deposits for the area (App. A, *infra*, p. 33).

Together, the acquired bank, ABC and United Bank account for 98.2 percent of total deposits in the City of Greeley, and 92 percent of deposits in the Greeley Area App. A, *infra*, pp. 32-33).[11]

While none of Bancorporation's subsidiaries competes directly with Greeley Area banks for local business, the acquiring holding company has maintained a presence there through a loan-production office operated by its lead bank, FNB Denver (PX 4, pp. 24-25; PX 40, Exh. F, pp. 31-32); it also has made a number of large loans in the area (PX 48). Bancorporation is the largest Colorado holding company not already in

[11] The only other bank in the City of Greeley, State Bank of Greeley, is a commercial bank (Tr. 729) with less than 2 percent of local deposits (App. A, *infra*, p. 33). There are two additional banks in the Greeley Area, which combined have slightly more than 6 percent of the area's total deposits (*Ibid.*).

the Greeley Area (Tr. 269-270). Of the three remaining holding companies in the state, only two appear capable of entry; the third has a total combined deposit figure which amounts to less than the deposits held by the acquired bank (*Ibid.;* compare App. A, *infra,* pp. 35-36 n. 5 with PX 74).[12]

E. *The Proceedings*

On July 9, 1969, Bancorporation applied to the Federal Reserve Board, pursuant to Section 3(a)(3) of the Bank Holding Company Act of 1956 (70 Stat. 134, as amended, 84 Stat. 1763, 12 U.S.C. 1842(a)(3)), for approval of the proposed acquisition of FNB Greeley. The Comptroller of the Currency recommended approval, but the Department of Justice advised the Board that it believed the combination " 'would have a significantly adverse effect on competition' " (DX 48, statement, p. 4). The Board approved the application by a four-to-three vote on June 9, 1970.[13]

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[12] Colorado CNB Bankshares, with combined deposits of $281.3 million; First Colorado Bankshares, with combined deposits of $120.4 million; Central Colorado Bancorporation, with combined deposits of $36 million (App. A, *infra,* pp. 35-36 n. 5).

[13] The three who dissented deemed the proposed acquisition to be anticompetitive (DX 48). In their view, the effect of the majority's approval is to permit Bancorporation, upon a minimal showing, to enter by acquisition into a market that is attractive for *de novo* entry, under circumstances where its existing presence could be expected to expand into a full service operation in competition with existing banks. They argued that the adverse impact of such a determination is accentuated by the ongoing holding company movement, which threatens to concentrate in the hands of a few the control of a large percentage of the banking institutions in Colorado's six most significant banking markets (Denver, Colorado Springs, Boulder, Fort Collins, Greeley, and Pueblo). The time to stop this trend, they concluded, is now.

The United States filed this civil antitrust action on July 8, 1970, thereby automatically staying consummation of the acquisition under Section 11(b) of the Bank Holding Company Act of 1956 (70 Stat. 138, as amended, 80 Stat. 240, 12 U.S.C. 1849(b)).[14] It claimed that the acquisition would substantially lessen competition by (1) eliminating Bancorporation as a potential entrant into the Greeley Area, (2) removing it as an external influence on the relevant market, and (3) contributing to the trend toward dominance of the state's banking institutions by a few large holding companies. In an amended complaint, it was further alleged that actual competition would be eliminated by the acquisition since FNB Greeley would thereby be foreclosed as a customer for the correspondent banking services in Colorado, offered by six Denver banks; and that this would thus contribute to the trend which had already foreclosed a substantial portion of the market for correspondent banking services due to holding company ownership of both supplier and customer banks.

Following a trial on the merits, the district court dismissed the complaint, holding that the government had failed to show that the effect of the acquisition "would be substantially to lessen competition" (App. A, *infra,* p. 47). It discounted as "future horribles" (*id.* at p. 52) the government's evidence of a trend in Colorado toward the acquisition by statewide holding companies of leading banks in separate local markets. Instead, noting that this was Bancorporation's first attempt to expand beyond the Denver metropolitan

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[14] On October 4, 1971, Mr. Justice White continued the stay pending disposition of this appeal.

area,[15] the court focused solely on the competitive impact that this particular acquisition would have on banking in the Greeley Area.

First, the court found that Bancorporation was not a potential *de novo* entrant into the relevant market. Relying solely upon figures showing comparisons of population per banking office (App. A, *infra*, p. 49), it determined that neither the Greeley Area nor Weld County was "underbanked."[16] Bancorporation officials, it pointed out, had denied any intention to enter the Greeley Area other than by acquisition of FNB Greeley. Moreover, "objective" evidence showing that Greeley's growth was only "moderate," and that the appropriate banking agencies would not now permit *de novo* entry, seemed, in the court's view, to give substance to these denials. Consequently, while recognizing Bancorporation's financial capability for *de novo* entry, it concluded that "the practical difficulties, together with the expense, argue against Bancorporation's following this route" (App. A, *infra*, p. 50).

The possibility that Bancorporation would make a "foothold" acquisition of Greeley's smallest bank was

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[15] It stated that "* * * thi. s the first effort on the part of the Government to halt the trend of acquisitions. It did not choose to intervene until after the United Banks of Colorado and Affiliated Bankshares had both entered the Greeley Area" (App. A, *infra*, p. 37).

[16] While Greeley's ratio of 6,484 persons per bank office is less than the 9,854 ratio for the state, it is larger than the national figure of 5,751 (App. A, *infra*, p. 49). Moreover, the addition of a seventh bank based on 1970 population figures would draw the ratio down to 5,557, or slightly less than the national average. Among the several states these ratios range from a statewide average low of 2,591 for South Dakota to a high of 13,470 for Florida (DX 22). Colorado's ratio is the second highest in the nation (*Ibid.*).

dismissed as unlikely under "the objective evidence presented" (App. A, *infra*, p. 50); however, the court made no mention of the other two "foothold" possibilities in the larger Greeley Area. It found little evidence demonstrating that Bancorporation was an existing influence in the market by its presence in the "wings" (App. A, *infra*, pp. 50-51).

Finally, portraying FNB Greeley as an unaggressive competitor, the court concluded that Bancorporation's control of FNB Greeley would not be likely to increase the likelihood of parallel behavior or make the acquired bank a less aggressive competitor (App. A, *infra*, p. 51).

The district court also rejected the government's argument that this acquisition would effect an anticompetitive foreclosure of FNB Greeley as a customer for Denver-based correspondent banking services. Ignoring the cumulative effect of this acquisition in light of existing customer foreclosure due to holding company ownership of both supplier and customer banks, it found simply that the 1.2 percent [17] foreclosure claimed by the government was insubstantial.[18] The court dis-

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[17] The district court accepted this figure only *arguendo*. First, it found questionable the government's reliance on interbank deposits as an acceptable measure of market shares in the correspondent banking market; it pointed out that wide variations in the amount of uncollected funds in deposit accounts distort the sums actually available for investment by the correspondent banks. Secondly, the court found that the government's market was improperly restricted to the interbank deposits of Colorado banks held by six Denver correspondent banks (App. A, *infra*, pp. 58-59).

[18] In light of this finding, the court found it unnecessary to decide whether Denver-based correspondent banking is an appropriate "line of commerce," and whether Colorado is an appropriate "geographic market or submarket" (App. A, *infra*, pp. 53-58).

tinguished cases holding similarly small foreclosure percentages to be anticompetitive on the ground that they involved national markets in other industries (App. A, *infra*, p. 60).

THE QUESTIONS ARE SUBSTANTIAL

The structure of banking business in the United States is presently experiencing significant changes. In many states, a few banking organizations have recently reached, or in the near future will reach, a position of dominance in the statewide banking business through acquisitions of leading local banks in significant banking markets throughout the state. This case is the first antitrust challenge to this trend to reach this Court.

The situation in Colorado is typical of this emerging movement. There, the trend toward concentration has rapidly accelerated, with Denver-based holding companies endeavoring to acquire control of established institutions which have large market shares in the state's various local banking markets. The result is a form of merger known as a market extension—*i.e.*, the entry of a firm into a new geographic market by acquisition of a firm already doing business there. Although such mergers do not change existing market shares, they may well affect significantly market structure and behavior by eliminating the potential competition of the acquiring organization. This case involves the legal criteria by which the substantiality of this effect is to be determined in market-extension acquisitions by banking organizations; it raises squarely the question of the extent to which Section 7 of the Clayton Act forbids this developing domination by a few organizations of a substantial percentage of the banking business in a particular state.

In resolving the question relating to potential competition in this case, the district court required the government to prove that competition "would be" lessened (App. A, *infra*, p. 47), rather than looking to whether the effect of the questioned acquisition "may be substantially to lessen competition or tend to create a monopoly," as required by Section 7. Moreover, it applied subjective rather than objective criteria in determining the substantiality of the acquiring bank's role as a potential competitor; it failed to give due weight to existing concentration in the Greeley Area; and it ignored the relationship between this particular acquisition and the undisputed trend toward concentration throughout the state. Finally, we submit, the court applied erroneous standards in ruling that the actual competition in the correspondent banking markets in Colorado which would be eliminated by this merger was not significant.

1. Under Section 7 of the Clayton Act, "potential competition" is significant to the preservation of actual competition in concentrated markets. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158; *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568; *United States* v. *Continental Can Co.*, 378 U.S. 441, 464-465.[19] The "potential competition" factor is applicable where there are a limited number of

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[19] See also *United States* v. *Standard Oil Co.*, 253 F. Supp. 196 (D. N.J.); *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.) affirmed, 385 U.S. 37; *United States* v. *Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill.); *Ekco Products Co.* v. *Federal Trade Commission*, 347 F. 2d 745 (C.A. 7); *General Foods Corp.* v. *Federal Trade Commission*, 386 F. 2d 936 (C.A. 3), certiorari denied, 391 U.S. 919.

firms on the edge of such a market with capability and incentive to enter it. Such firms are competitively important because they are a source of future deconcentration by independent entry, and because their position is an external factor influencing the conduct of those already in the relevant market. *Ibid.*

a. In the banking industry potential competition is particularly important. A recognized authority in state and federal bank regulation has recently written that "the potential competition standard may be the only criterion available to the bank regulatory agencies or the courts by which a trend toward a market dominated by only a handful of banks or bank holding companies may be checked."[20] The swiftness with which such a trend may develop in particular states across the country has been documented by the Federal Reserve Board.[21] To be sure, state and federal laws generally forbid entry by out-of-state banking organizations. See, *e.g.*, 12 U.S.C. 1842(d). Behind this legal barrier, however, there has been an accelerated trend in states which permit acquisitions, either under branching laws or by

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[20] Frank Wille, then New York Superintendent of Banking, now Chairman, Federal Deposit Insurance Corporation, in Foreword to Kohn and Carlo, *Potential Competition: Unfounded Faith or Pragmatic Foresight?* (N.Y. State Banking Dept. 1970).

[21] Board of Governors of the Federal Reserve Board, "Recent Changes in the Structure of Commercial Banking," 56 Fed. Res. Bull. 195 (1970). Statewide concentration ratios measured by total deposits held by the largest five banking organizations are very high. In some states where the concentration has been very intense, there have recently been signs of some deconcentration as new banking organizations have been created. The situation in the banking industry is therefore at a crucial stage in which the trend could go either way.

holding companies, toward the acquisition by the statewide leaders of banks with the largest market shares in local banking markets.[22] In a number of these states, this trend has progressed to the point where two or three banking organizations together control more than half of the state's total deposits (PX 30).

Because local banking markets can support only a limited number of banks, such markets are inherently concentrated. When large institutions within a state enter most of that state's significant markets by purchasing large market shares, there develops, as the government's expert testified in this case (Tr. 435-436), a situation in which the same organizations begin to confront each other as the dominant factors in concentrated markets all over the state. This encourages a tendency to develop parallel practices in such commonly linked oligopolistic markets without regard to local competitive conditions (*ibid.*). Consequently, there is a real danger that such dominant banks will tacitly renounce vigorous competition (Tr. 451-456). "As that condition develops the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Alcoa*, 377 U.S. 271, 280.

As we have already indicated, such a situation now threatens in Colorado; seven Colorado holding companies already control more than half of the state's total deposits (App. A, *infra*, p. 35), including 13 of the 27 banks outside of Denver having total deposits in excess of $20 million (PX 125).

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[22] See Brimmer, *Market Structure, Public Convenience and the Regulation of Bank Mergers*, 86 Banking L.J. 773, 776-778 (1969).

The district court dismissed these considerations as "future horribles" (App. A, *infra*, p. 52). But, it is just such "future horribles" that are the primary concern of Section 7 of the Clayton Act. That provision prohibits acquisitions whose effect may be substantially to lessen competition; it is carefully designed to cut off anticompetitive movements in their incipiency. See, *e.g., United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317-318. A state may not be a banking market in the strict economic sense, but it clearly is an area of the country entitled to protection under Section 7 (see *United States* v. *Pabst Brewing Co.*, 384 U.S. 546); it has competitive significance in banking because entry from outside is barred by law (cf. *United States* v. *Philadelphia National Bank, supra*).

Where, as here, the particular acquisition challenged is part of a statewide trend toward concentration, that trend is necessarily relevant to a proper evaluation of the effect that the acquisition "may tend" to have upon competition (370 U.S. at 317). If all the local banking markets in a state should become dominated by the same few firms, bank customers would no longer have a meaningful alternative to the banking policies of the acquiring companies; the safeguard against possible exploitive conduct that inheres in the availability of alternative banking markets in the state disappears once those markets become dominated by the same firms.[23]

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[23] This is substantiated by the testimony of a banker in Greeley who concluded that, if prices for bank services in Greeley should

b. Even putting to one side for the moment the court's failure to attach any importance to these statewide considerations, we submit that the district court applied the wrong standard in assessing the acquiring bank's role as a potential entrant into the Greeley Area. Principal reliance was placed on testimony by FNB Denver officials that Bancorporation would not enter the market except by acquisition of FNB Greeley, with its large market share. But the determination with respect to potential competition in a Section 7 case should not turn on such subjective, self-serving statements; the competitive status of a firm on the edge of the relevant market must be ascertained on the basis of objective evidence, showing the potential entrant's financial capability to enter independently, its economic incentive to do so, and the reasonable prospects for making such an entry successfully. Thus, in *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 175, after a full review of objective evidence showing the capability and incentive of joint venturers to enter a market independently, this Court held: "Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." See also *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580-581.

The reason is manifest. The proper question before the court in potential competition cases should not be whether management considered independent entry to

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now get "out of line," business could be lost to FNB Denver, the acquiring bank (Tr. 775-776).

be preferable to entry by acquisition, but whether independent entry is preferable to no entry at all for a firm with the defendant's capabilities and incentives. Entry by purchasing a large share of the market is always preferable to the hard competition required for successful entry *de novo,* or by a small "foothold" acquisition.[24] Moreover, if subjective evidence were determinative, effective enforcement of Section 7 would be seriously jeopardized, since the test of potential competition would then depend upon the trial court's evaluation of the sincerity of an acquiring firm's statements that independent entry is not a feasible alternative. Such a standard would make the antitrust consequences of an acquisition completely unpredictable to both business and government. Plainly, that is not the case under the proper objective standard, based essentially on whether the market is attractive and the firm has the necessary capability to enter it; the type of showing that would warrant classification of a firm as a potential independent entrant on the basis of that test is readily ascertainable.

In the instant case, Bancorporation had both the capability and the interest to be viewed objectively as a potential entrant into the Greeley market. Unquestionably, it had the resources. Its interest in expanding into the major local markets outside of Denver was reflected clearly in the series of acquisition applications that it filed.[25] Moreover, there was ample incentive to

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[24] On "toehold" entry, see, *The Bendix Corp.*, (FTC), 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *The Bendix Corporation* v. *The Federal Trade Commission,* (C.A. 6, No. 20,687, October 18, 1971).

[25] See n. 7, *supra,* and accompanying text.

enter Greeley in particular: the area had experienced substantial growth in the past ten years (pp. 7-8, *supra*), and the banks doing business there were all profitable (thus casting doubt on the district court's conclusion that the market was "overbanked"). And, as noted earlier, there was one small commercial bank in the City of Greeley, and two other small commercial banks in the Greeley Area, which were available to Bancorporation to establish a "foothold" in the relevant market.[26]

c. To be sure, the Regional Administrator of National Banks testified that he would not presently recommend a new charter for the area (App. A, *infra*, p. 50).[27] But that, in itself, is not, in our view, sufficient to alter the acquiring firm's status as a *potential* entrant. Where, as we submit is the case here, new entry is not barred by any clear indication that a community is over-banked—*i.e.*, if the market is still growing and the banks doing business there are profitable—a regulatory decision with respect to new entry does not turn on the need to protect existing banks from harmful

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[26] Bancorporation had in fact broken off negotiations for the purchase of a bank in a town 15 miles outside of Greeley—Windsor, Colorado—after FNB Greeley became available (PX 41; PX 241). It had been interested in the Windsor bank because Eastman Kodak was locating a major industrial facility in Windsor, which would affect the economy of Greeley, Fort Collins and Loveland (see PX 4, pp. 21, 30-31; 34; Tr. 120-132).

[27] The district court also interpreted the testimony of the State Banking Commissioner to be that he would not now approve a new charter. But, the Commissioner actually declined to take any position at trial on that question in the absence of a pending application (Tr. 1200-1204).

competition. Rather, it is premised on the convenience and needs of the community to be served at the time that the application for entry is under consideration. As conceded by defendant's witnesses, this depends upon a wide range of variables unique to each market (Tr. 834, 1199-1204; DX 42-43). Whatever disposition the regulatory agencies might make on an evaluation of those variables in the present context, defendants' own expert witness acknowledged that, if Greeley banks abused their market power, the agencies might then open the gates to new entry (Tr. 976-977).

Indeed, precisely because Bancorporation remains a significantly potential entrant, without regard to the present liklihood of its obtaining a new charter from the regulatory agencies, the bank customers in Greeley are more likely to receive effective performance by the existing banks in the area. Greeley is a concentrated banking market; this Court has held that anticompetitive consequences may be inferred from concentration in banking markets in the same manner as in other industries. *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 363; *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 365-366. There is, therefore, a clear need for the influence of a few significant potential entrants. As this Court observed in *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 174, "[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." Here, there are only two such corporations

in addition to Bancorporation not in the Greeley Area, and the loss of the latter, the most significant of the three, as a potential entrant would have a serious adverse effect on competitive interests in the Greeley area.[28]

2. This acquisition also would have another anticompetitive effect: the foreclosure to other Denver banks of FNB Greeley as a customer for correspondent banking services in Colorado. Correspondent banking, like commercial banking, is a congeries of services clustered around demand deposits; it involves, however, banking services that are provided by large "city" banks to small "country" banks, rather than to the public at large (Tr. 531, 571, 580-589). In a unit-banking state, such as Colorado, these services are supplied to and through local banks by correspondent relationships, and are generally paid for by the maintenance of correspondent balances, which are in fact interbank demand deposits (Tr. 646-648).

Banks offering a full range of correspondent banking services—such as check clearing, international banking, investment advice, personnel acquisition as-

[28] In disputing that Bancorporation exerted a competitive influence by its presence in the "wings", defendants relied essentially on testimony of local bankers in the Greeley Area that their past market decisions have not been affected by the fact that the acquiring company was located on the edge of the market. Such testimony, however, is entitled to little weight. Plainly, those already in the market prefer that Bancorporation enter by acquiring an established market share, rather than by adding to the number of actual competitors by coming in *de novo*. Moreover, it is doubtful that they would want to go on record as stating that their local competitors are so unaggressive that their real worry comes from the competitive threat posed by outsiders. Cf. *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 367 n.43.

sistance and training, overline loans,[29] and the like (Tr. 667-668)—tend to be located in the financial and political centers of a state (Tr. 609-610, 656-658).[30] Moreover, customers for full-range correspondent banking services tend to be limited to "country" banks located in the same state, in part because it is important to have a primary correspondent familiar with local banking regulations (Tr. 531, 610-612, 656-658; see also Tr. 54).

At the end of August 1970, based on interbank deposits, approximately 12 percent of the market for correspondent banking in Colorado was foreclosed by holding company ownership of both supplier and customer banks (PX 215; Tr. 688). Bancorporation's acquisition of the National State Bank of Boulder [31] adds 2.5 percent to this figure (PX 164, 217; Tr. 689-689A), and its acquisition of Security State Bank in Sterling will add another 0.8 percent (PX 217).

The acquisition of FNB Greeley would increase holding company ownership by an additional 1.2 percent. In numerous cases, it has been held that foreclosure of even a relatively small percentage of a market may produce a substantial lessening of competition. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (2 percent, 1.5 percent and 1 percent).[32] The district court

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[29] Overline loans are loans made together with another bank that is unable to satisfy its customers' credit needs because of its legal lending limits.

[30] Some of these services may be offered by specialty organizations, such as savings and loan associations, which provide specific competition for commercial banks but do not compete over the entire offering of services (see Tr. 553, 609-610, 633).

[31] See n. 3, *supra*.

[32] See also *United States* v. *Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D. Cal.) (2 percent); *United States* v. *Kennecott Copper*

held that these cases were inapplicable in the present context on the ground that they involve national, not local, markets. But this Court has made it clear that the antitrust laws apply with the same vigor in local markets as in the larger areas. *United States* v. *Philadelphia National Bank, supra; United States* v. *Phillipsburg National Bank, supra.*

Moreover, we think it is improper to consider the acquisition involved here in isolation, as the district court did. Rather, in determining whether the foreclosure of FNB Greeley may tend substantially to lessen competition within the meaning of Section 7 of the Clayton Act, the transaction must be viewed in the context of the clear trend now developing in Colorado toward foreclosure of the correspondent banking market through large bank holding company acquisitions. Cf. *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 277.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1971.

Corp., 231 F. Supp. 95 (S.D.N.Y.) (7.6 to 10 percent); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.).

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2413

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY,
DEFENDANTS.

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MEMORANDUM OPINION AND ORDER

DOYLE, Judge.

I. PRELIMINARY STATEMENT

Involved in this action is the attempted acquisition of The First National Bank of Greeley by the First National Bancorporation, Inc. The United States has instituted this suit under Section 15 of the Clayton Act, 15 U.S.C. § 25, seeking an injunction preventing the alleged violation of Section 7 of the Clayton Act. The cause was tried to the Court, and following the filing of post-trial briefs, together with proposed findings, has been submitted.

A. *Background of This Litigation*

On June 9, 1970, the Board of Governors of the Federal Reserve Board approved in a four-to-three decision the application of First National Bancorporation, Inc. for the acquisition of 80 percent or more of the vot-

ing shares of The First National Bank of Greeley. The opinion of the Board recites that the comptroller had been duly notified and had approved the application. The majority opinion considered all of the evidence and concluded that the proposed acquisition would not have the effect of substantially lessening competition or would not tend to create a monopoly. It was pointed out that this was the first expansion by First National Bancorporation, Inc. outside the Denver area, and that while other applications about which the Board had knowledge might change the banking structure in the state, that this one would not have such an effect. It was noted that one of the competitors in Greeley was also a leading competitor of First of Denver in Denver (United Bank); that there existed, however, no likelihood that a structure in Greeley would result in mirroring the situation in Denver. In a concurring opinion one of the Governors pointed out that Weld County (where Greeley is located) is not underbanked; that, rather, there are more banking institutions per population than in adjoining counties of Larimer and Boulder.

The main thrust of the minority opinion was that the proposed acquisition was one step in a trend toward concentration not only in the Greeley area but in the state as a whole, and that the Board should not approve an acquisition in furtherance of this trend. The minority finally said:

> In our view, the effect of consummation of the applicant's proposal would be to substantially lessen *future* competition in Greeley, in Weld County, and perhaps in other Colorado areas which might

otherwise have been served by a new organization which bank could have significantly participated.

The minority also considered that one result of the acquisition would be to close a mortgage loan production office maintained by The First National Bank of Denver, the lead bank of Bancorporation, and would thus remove this institution as a competitor, and would also lessen potential competition resulting from The First National Bank of Denver being on the threshold of the market.

B. *The Banking Institutions Involved*

As noted above, Bancorporation is a registered bank holding company organized under the laws of Colorado and maintains its principal place of business in Denver. On the other hand, The First National Bank of Greeley is a national banking association organized under the laws of the United States, which operates in Greeley, Weld County, Colorado, which is roughly 50 miles north of Denver. Both Bancorporation and The First National Bank of Greeley are engaged in interstate commerce. Moreover, the Court has jurisdiction of the action.

The main nucleus of Bancorporation is The First National Bank of Denver. However, there are three other subsidiaries—commercial banks—all of which are located in the metropolitan area surrounding Denver, Colorado. The First National Bank of Denver is the largest commercial bank in Colorado. Its total deposits as of June 1970 amounted to $468.0 million, 12.3% of the total commercial bank deposits within Colorado. Its

assets total $586.5 million, and its loans and discounts total $340.8 million.

The other three commercial banks, subsidiaries of Bancorporation, are The First National Bank of Northglenn, The First National Bank of Bear Valley and The First National Bank of Southglenn. Each of these banks was organized *de novo* by officers and directors of The First National Bank of Denver.

The Northglenn bank was established on November 14, 1963. It is located in the suburban community of Northglenn in Adams County, which adjoins Denver County. It has been, from the date of its opening to the date of its acquisition by Bancorporation, an affiliate of First National Bank of Denver. Its total assets as of June 1970 amounted to $9.5 million. It had total deposits of $8.5 million and total loans and discounts of $6.1 million. Its income in 1969 amounted to $780,058, an increase over prior years.

The First National Bank of Bear Valley was also organized by officers and directors of the First National Bank of Denver, having been established on June 15, 1964. This institution is located within the City and County of Denver and has been, from the date of its opening to the date of its acquisition by Bancorporation, an affiliate of The First National Bank of Denver. The total assets of the Bear Valley bank are $11.4 million. Its total deposits are $10.1 million, and its loans and discounts total $6.9 million. Its income as of 1969 had substantially increased over the prior years.

Similarly, The First National Bank of Southglenn was organized *de novo* by officers of The First National Bank of Denver, having been established on November

30, 1964, in Littleton, Arapahoe County, Colorado. It was an affiliate of The First National Bank of Denver from the date of its opening until its acquisition. As of June 1970, it had total assets of $6.4 million, total deposits of $5.8 million and total loans and discounts of $3.2 million. Its total income in 1969 was substantially higher than in prior years.

As noted above, the present acquisition represents the first attempt by Bancorporation to acquire a banking institution outside of Denver. This application was approved, as also noted, by the Board of Governors on June 9, 1970. On July 8, 1970, the Antitrust Division of the Department of Justice brought the present suit.

The First National of Greeley was established in 1884. Its only office is in the City of Greeley, County of Weld. As of June 1970, its deposits totaled $39.2 million, and its total loans and discounts amounted to $28.9 million. It is the fifteenth largest bank in Colorado from the standpoint of total deposits, and the twelfth largest in terms of total loans and discounts.

The evidence does not disclose that there is competition at the present time between The First National Bank of Denver and The First National Bank of Greeley. To be sure, The First National Bank of Denver maintains a mortgage loan production office in the City of Greeley. This institution does not perform banking functions, but rather sells and services real estate loans to long-term investors such as savings and loan institutions, mutual savings banks and insurance companies. This service is performed for a fee and the most that can be said as to its contribution to the objectives of Bancorporation and First National Bank of Denver is

that it undoubtedly serves to furnish information as to the market conditions to the First National, although there is no evidence in the record which establishes this fact. In other respects the First National Bank cooperates with The First National Bank of Greeley in connection with overline loans either itself or through its correspondent banks in other sections of the country. The First National Trust Department administers a small number of trusts for individuals who live in Weld County, but it does not solicit this kind of business there. Accordingly, it cannot be said that the proposed merger or acquisition qualifies as a horizontal one.

C. *Commercial Banking Institutions in Greeley*

There are six commercial banks in the City of Greeley and two other banks in what is referred to as the Greeley Area—which includes communities adjacent to the City of Greeley.[1] The following Table sets forth the relative percentages of total deposits held by each of these eight banks as of June 1970:

TOTAL DEPOSITS-COMMERCIAL BANKS IN THE CITY OF GREELEY AND THE GREELEY AREA *

	(Dollar amounts in thousands) June 1970		
	Amount	% of City	% of Area
FIRST NATIONAL BANK OF GREELEY	$ 39,237	33.9%	31.8%

[1] The seven banks other than FNB Greeley were listed in Bancorporation's application to the Board of Governors of the Federal Reserve System as "all other banks that Applicant believes to be competing with" FNB Greeley.

	Amount	% of City	% of Area
AFFILIATED BANKSHARES OF COLORADO, INC.			
Greeley National Bank	39,279	34.0	31.8
Cache National Bank	7,080	6.1	5.7
West Greeley National Bank	3,273	2.8	2.7
UNITED BANKS OF COLORADO, INC.			
United Bank of Greeley	24,743	21.4	20.0
State Bank of Greeley	2,070	1.8	1.7
CITY OF GREELEY	115,682	100.0%	93.7
South Platte National Bank, LaSalle	2,773		2.2
Eaton Bank	4,983		4.0
TOTAL: GREELEY AREA *	$123,438		100.0%

Note: Detail may not always add to total due to rounding.

* Includes City of Greeley, and adjacent towns of Evans, LaSalle, Peckham, Kersey, Gill, Eaton, Lucerne, Farmers and Bracewell.

Source: Reports of Condition of individual banks, June issues, 1969 and 1970.

While there is some evidence that FNB Greeley and other Greeley Area banks effectively compete in the rest of Weld County,[2] Bancorporation's Application to the Board of Governors of the Federal Reserve System

[2] FNB Greeley has $3,130,000 of its $28,897,000 in loans in the rest of Weld County (outside the Greeley Area).

to acquire FNB Greeley characterizes an area similar to the Greeley Area as FNB Greeley's "Primary Service Area" and characterizes an area extending easterly and northeasterly from Greeley (comprising somewhat less than half of Weld County) as FNB Greeley's "sphere of influence."

The City of Greeley, the Greeley Area and Weld County have all experienced a moderate amount of economic and population growth over the last decade,[3] although the area certainly cannot be characterized as a "boom" area such as Boulder or Colorado Springs. Some industry has moved into the area during recent years, but Weld County continues to be primarily a farming area and agricultural loans continue to constitute a substantial part of the bank's business.[4] There is also evidence concerning odors from the packing

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[3] The 1970 population of the Greeley Area was 58,500, a 29.3% increase over its 1960 population of 45,228. Most of the population growth in the Greeley Area is attributable to the City of Greeley. Economic statistics presented by plaintiff indicate that from 1960 to 1970 the number of main telephones in the Greeley Area increased 48.2% and electric power consumption increased 115.8%. Gas customers increased 45.3%, while total gas volume consumed increased 127.3%. In addition, the rural families served by the Greeley Post Office have increased 43.3% since 1960, while the number of individual customers served has increased 27.8%. The growth of the City of Greeley and the Greeley Area has also been reflected throughout Weld County as a whole. Finally, the population of the City of Greeley is roughly 38,000, of which 10,000 consist of students attending the college located there.

[4] Whereas farm earnings accounted for 49.2% of total earnings in Weld County in 1950, by 1968 they had decreased to 28.3% of total earnings. In the same period, earnings from manufacturing increased from 4.1% to 11.1%. The industrial usage of gas increased from 15.2% of the gas consumed in 1960 to 35.9% of the gas consumed in Weld County in 1970. This diversification took place during a time in which Weld County remained one of the top ten agricultural counties in the United States.

plants and feedlots which suggests that Greeley is not likely to become a great population center in the near future. Despite this growth, there is some evidence to the effect that the Greeley Area is presently quite adequately served by its existing banking institutions.

D. *Statewide Holding Companies*

One other aspect which should be mentioned in connection with the background of this case is that the last decade has seen a trend of holding company formations and bank acquisitions in Colorado. As of December 31, 1960, Western Bancorporation of Los Angeles was the only bank holding company operating in Colorado. It had three bank subsidiaries which held 4.4% of the total commercial bank deposits in the state ($87.5 million). As of December 31, 1970, there were seven bank holding companies in Colorado with 41 commercial bank subsidiaries. These holding company banks, as of June 1970, held 51.1% of total Colorado deposits.[5]

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[5] The following table summarizes the percentages of Colorado deposits held by each of the bank holding companies and the areas in which their subsidiaries operate. The holding companies are listed in order of their formation.

TOTAL DEPOSITS HELD BY BANK HOLDING COMPANIES IN COLORADO AS OF JUNE 1970
(Dollar amounts in thousands)

BANK GROUP	Amount	% of Colorado
WESTERN BANCORPORATION (operating three banks in Denver, Englewood and Fort Collins)	$ 197,858	5.2
FIRST COLORADO BANKSHARES (formation approved, 11/16/61) (operating four banks in Denver, Englewood and Wheat Ridge)	120,378	3.1

In addition, Bancorporation has received Federal Reserve Board approval for the acquisition of FNB Greeley and the Security State Bank of Sterling (these are in litigation), and it has an application pending for approval of the acquisition of the National State Bank of Boulder. Bancorporation's applications to acquire banks in Montbello and Pueblo have been denied, and the agreement to acquire the Exchange National Bank of Colorado Springs, for which approval had been

[5] (continued)

Bank Group	Amount	% of Colorado
United Banks of Colorado, Inc. (formation approved, 11/7/63) (operating nine banks in Denver, Aurora, Boulder, Greeley, Littleton, Fort Collins, Lakewood, Pueblo and Grand Junction)	565,486	14.8
Colorado CNB Bankshares (Formation approved, 11/29/67) (operating five banks in Denver, Lakewood and Glenwood Springs)	281,327	7.3
First National Bancorporation, Inc. (formation approved, 5/27/68) (operating four banks in Denver, Southglenn, Bear Valley and Northglenn)	495,675	12.9
Affiliated Bankshares, Inc. (formation approved, 12/31/69) (operating 13 banks in Colorado Springs, Fort Carson, Manitou Springs, Loveland, Greeley, Ault, Boulder, Lafayette and Louisville)	260,176	6.8
Central Colorado Bancorporation (formation approved, 3/31/70) (operating three banks in Colorado Springs and Rocky Ford)	36,012	0.9
	$1,956,912	51.1

Compiled from plaintiff's Exhibits 113 and 115.

granted, has been mutually rescinded by the parties. Also, United Banks of Colorado, Inc. has received approval to acquire the Colorado Springs National Bank (this is also in litigation). Bancorporation's attempt to acquire FNB Greeley is its first attempt to acquire a bank outside the Denver metropolitan area. Also, this is the first effort on the part of the Government to halt the trend of acquisitions. It did not choose to intervene until after the United Banks of Colorado and Affiliated Bankshares had both entered the Greeley Area. Affiliated Bankshares has acquired Greeley's largest and most vigorous bank, Greeley National Bank, plus two additional smaller banks in the area.

II. The Issues

It is not contended by the government that there exists at the present time any substantial competition between First of Denver and First of Greeley which could be affected by the present acquisition. It is maintained, rather, that *potential* competition would be affected. The government's argument is that if the Bancorporation is to enter the Greeley or the Weld County market, it should do so *de novo* or via the acquisition of the Greeley State Bank, a very small institution, whereby the assets and economic power of First could be utilized in enhancing the competitive atmosphere within the Greeley market. It is also maintained that the presence of two other bank holding companies within the City of Greeley results in the market being presently a concentrated one which is likely to result in further concentration with the present acquisition and, finally, entrenchment is likely to result, whereby a substantial threat to competition in the future exists.

A second line of attack which was devised by the government just prior to trial is to the effect that correspondent banking is a distinct line of commerce apart from commercial banking and that there are a limited number of banking institutions in Denver with capacity to offer a full range of correspondent banking services, one of these being The First National Bank of Denver. It is said that presently there is competition among about six banks in Denver for the offering of this character of service and that the present acquisition will remove a customer and, thus, to that degree will tend substantially to lessen competition in the offering of correspondent banking services to country banks in Colorado.

III. Potential Competition

In a case alleging violation of Section 7 of the Clayton Act, the government has the burden of proving the "reasonable probability" of a substantial lessening of competition. *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). As the Supreme Court has noted,

> [d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected.[6]

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[6] Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962), *quoting from* United States v E. I. du pont de Nemours & Co., 353 U.S. 586, 593 (1957).

> The "area of effective competition" must be determined by reference to a product market (the "line of commerce") and a geographic market (the "section of the country").[7]

The government charges that if consummated the effect of the proposed merger may be to substantially lessen competition, in violation of Section 7 of the Clayton Act, through the elimination of *potential* competition. When such a violation is found, the Bank Merger Act of 1966 requires the District Court to decide whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. § 1828(c)(5)(B).

The government has the burden of proving the "reasonable probability" of a substantial lessening of competition. *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). The burden of proving that the exception set forth in 12 U.S.C. § 1828(c)(5)(B) is satisfied rests with the defendant banks. *United States* v. *First City National Bank of Houston*, 386 U.S. 361, 366 (1967). This Court is required to review *de novo* the issues presented, using the identical standards applied by the regulatory agencies. 12 U.S.C. § 1828.

A. *Economic Effects*

There being no direct competition here, the proposed merger between the banks at bar is what is described as a "geographic market extension" merger. As such, the

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[7] Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

concentration in the relevant market remains the same after the merger. It limits us to an evaluation of whether it has the effect of removing a *potential market entrant* and to a consideration whether Bancorporation, which is not yet in the market, may still be a present competitive force, the presence of which deters oligopolistic practices, whereby its merger with a member of that market may eliminate competition in much the same way that a simple horizontal merger can. However:

> The sight of a particular firm "waiting at the market's edge" may emphasize the entry threat, but it is *ease of entry*, not necessarily an identifiable potential entrant, that limits present market power by reminding existing firms that high profits will attract outsiders. The competitive situation will not be affected by a merger with a particular potential competitor unless the merger alters entry conditions or is thought to alter them. Existing firms would have no reason to change their behavior unless they supposed that the merger eliminated the one firm uniquely capable of entering or substantially reduced the probability of new competition by eliminating one from a small universe of potential entrants. Areeda, *Antitrust Analysis* at 517 (1967) (emphasis added).

Thus, the issue is a narrow one requiring the weighing and evaluation of future projections—a most difficult process having few tangible standards.

A "geographic market extension" merger can, of course, have the *future* effect of eliminating one who

would have entered the market independently but for the merger, thereby adding to the number of competitors in the future, but there must be at least some evidence to support a prophecy that such an entrance will occur.

How important the elimination of a potential entrant is will depend in part on how *concentrated* the market is, concentration being one indication of a firm's market power. Where concentration is quite low, the merger will have few adverse effects because the market will remain unconcentrated after the merger. Where the concentration is high, the merger removes the potential competitor as a restraining influence and the anticompetitive effects can be significant.

B. *The Product Market*

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356 (1963), the Supreme Court held that *commercial banking* was the relevant product market within which to measure the effects of the proposed horizontal bank merger:

> [T]he cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking" * * * composes a distinct line of commerce. *Id.*

Several district court cases involving bank mergers have criticized this definition of a "line of commerce" on the basis that it does not take into account the cross-elasticity resulting from competition between banks and other institutions providing many of the same

products and services included within the definition of "commercial banking."[8] We fail, however, to see any room for such criticism either on the merits of the question or on the basis of positive law. Since *Philadelphia National Bank* the Supreme Court has again stated in no uncertain terms that commercial banking is the relevant line of commerce. In *United States* v. *Phillipsburg National Bank and Trust Company*, 399 U.S. 350, 360-61 (1970), the Supreme Court said:

> Commercial banks are the only financial institutions in which a wide variety of financial products and services—some unique to commercial banking and others not—are gathered together in one place. The clustering of financial products and services in banks facilitates convenient access to them for all banking customers. For some customers, full-service banking makes possible access to certain products or services that would otherwise be unavailable to them; the customer without significant collateral, for example, who has patronized a particular bank for a variety of financial products and services is more likely to be able to obtain a loan from that bank than from a specialty financial institution to which he turns simply to borrow money. In short, the cluster of products and services termed commercial banking has economic sig-

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[8] United States v. Idaho First National Bank, 315 F. Supp. 261, 267-68 (D. Idaho 1970); United States v. First National Bank of Maryland, 310 F. Supp. 157, 168 (D. Md. 1970); United States v. First National Bank of Jackson, 301 F. Supp. 1161, 1181 (S.D. Miss. 1969); United States v. Crocker-Anglo National Bank, 277 F. Supp. 133, 151-53 (N.D. Calif. 1967).

> nificance well beyond the various products and services involved.

In addition, "commercial banking" is even more relevant as a line of commerce where, as here, a small country bank is being acquired. *Id.* at 361-62. Moreover, the record here does not disclose what other institutions, if any, compete with Greeley banks for the products and services which they offer. Hence, there could be no justification for a contrary holding. Therefore, we conclude that the relevant line of commerce is commercial banking.

C. *Relevant Geographic Market for Measuring the Effects of an Alleged Elimination of Potential Competition*

The test for determining the relevant geographic market is set forth in *United States* v. *Philadelphia National Bank, supra,* wherein the Supreme Court said:

> The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. * * * [A]s we recently said in a related context, the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies.*" *Id.* at 357-59 (emphasis original).

In the case at bar we determine that the "Greeley

Area" rather than Weld County (as argued by Bancorporation) is the relevant geographic market within which to measure the effects of the proposed merger upon *potential* competition. This area provides FNB Greeley with a substantial amount of its loans and deposits: 81.9% of its demand deposits, 77.7% of its savings deposits, 76% of its time deposits, 80.6% of its commercial and industrial loans, 71.9% of its personal installment loans, 74.3% of its single payment loans, 75.6% of its real estate loans and 64.5% of its loans to farmers. Although comparisons in the present context are not too persuasive, we note that compared to the four-county area determined to be the relevant geographic market in the *Philadelphia National Bank* case, 81.9% of FNB Greeley's demand deposits came from the Greeley area (versus figures of 56% and 77% in *Philadelphia National Bank*), 80.6% of its commercial and industrial loans (versus 54% and 63%), and 75.6% of its real estate loans (versus 74% and 84%). The rest of Weld County supplied respective amounts of 6.6%, 1.8% and 9.9%.

Because individuals and corporations generally prefer to do their banking in their local communities, banks normally have a very localized business:

> [C]onvenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance. * * * The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries. *Id.* at 358.

The localization of business typical of the banking industry is especially pronounced where, as here, a country bank is involved:

> We stated in *Philadelphia Bank* * * * that "in banking the relevant geographical market is a function of each separate customer's economic scale"—that "the smaller the customer, the smaller is his banking market geographically" * * *. Small depositors have little reason to deal with a bank other than the one most geographically convenient to them. For such persons, geographic convenience can be a more powerful influence than the availability of a higher rate of interest at a more distant, though still nearby, bank. The small borrower, if he is to have his needs met, must often depend upon his community reputation and upon his relationship with the local banker. * * * Thus, the small borrower frequently cannot "practicably turn for supplies" outside his immediate community; and the small depositor—because of habit, custom, personal relationships, and, above all, convenience—is usually unwilling to do so. *United States* v. *Phillipsburg National Bank and Trust Company,* 399 U.S. 350, 363-64 (1970).

Individuals and corporations in Greeley, for instance, do not normally deposit their funds in Denver banks, and their counterparts in Denver seldom keep their deposits in Greeley banks. Convenience becomes less important only when banking transactions assume large proportions. Since Colorado prohibits branch banking, FNB Greeley has no other offices in Weld County or in any other location.

The defendants contend that Weld County is the relevant area for measuring the effects of the merger. Approximately 10.7% of FNB Greeley's business comes from the rest of Weld County. Since there are seven other banks serving this expansive area, it is not surprising that this figure is not larger given the incidence of convenience which attends banking. 10.7% would not appear quite so insignificant if it represented, for instance, 80% of the business available in the rest of Weld County. Whatever foreclosures or other anticompetitive effects might result from this merger must be measured, of course, in terms of those being affected. The defendants, however, have failed to introduce sufficient evidence suggesting that the business solicited by FNB Greeley and the other Greeley banks from the rest of Weld County represents a significant share of what is available.

Moreover, the defendants have also stated that the Greeley area is their "primary service area" or the area of effective competition. In their application to the Board of Governors of the Federal Reserve System for approval, they noted:

> *Judgment of Bank's officers as to Bank's approximate service area, the actual or estimated population of such area, and an explanation of the basis for such a service area delineation.*
>
> Greeley's Primary Service Area, that area within which approximately 80% of Greeley's I.P.C. Demand, Savings and Time deposits originate, and within which an excess of 75% of Greeley's loans originate, is more particularly described as follows: Commencing at Eaton, Colo-

rado, located 7 miles north of the city of Greeley, extending in a southeasterly direction approximately 15 miles to the community of Gill, Colorado, thence in a southwesterly direction approximately 23 miles to the community of Platteville, Colorado, thence in a north-northeasterly direction returning to the original point.* * *

In addition to Greeley's Primary Service Area, described above, there exists a "sphere of influence which extends in an easterly and northeasterly direction from the city of Greeley proper, and covers an area of Weld County large in size but sparsely populated.* * *

In view of the foregoing, it is our conclusion that the proper geographic area is that urged by the government, that is, the City of Greeley and its environs and satellite communities, including the towns of Evans, LaSalle, Peckham, Kersey, Gill, Eaton, Lucerne, Farmers and Bracewell.

D. *Effect on Competition in Commercial Banking in the Greeley Area*

We turn now to the question whether the proposed acquisition has been shown to be in violation of Section 7 of the Clayton Act in that its effect would be substantially to lessen competition in any line of commerce in any section of the country. The government emphasizes the fact that the Bancorporation is the second largest banking institution in the state, and from this fact alone would have us hold that its entry into the Greeley market by way of this acquisition would in and of itself substantially lessen competition.

The government argues that if relief is granted against this present acquisition, Bancorporation will enter the market *de novo* or through some other acquisition, the effect of which would be to promote rather than to lessen competition.

As previously noted, the principal subsidiary of Bancorporation is First National Bank of Denver. Bancorporation's other three subsidiaries are small institutions located on the outskirts of the Denver metropolitan area. They do not add measurably to the economic power of Bancorporation. Nor can it be said that the acquisition of FNB Greeley would significantly increase Bancorporation's economic power since FNB Greeley is not a large bank, although it is the second largest institution in Greeley. It is second to Affiliated Bankshares of Colorado which has three subsidiary banks in the Greeley area and which has 40.2% of the total deposits as against the 31.8% held by FNB Greeley.

We consider it significant that the market share of the FNB Greeley has been on the decrease during the past 20 years. The Greeley National Bank, on the other hand, its principal competitor, has been steadily gaining ground. FNB Greeley is shown by the evidence to lack management depth and to have not been pursuing aggressive competitive policies. Bancorporation promises to remedy all this, whereby the acquired institution will become a vigorous competitive influence. These, of course, are mere promises which are not entitled to weight in the present evaluation except that it can be said with some assurance that the competitive

influence of FNB Greeley is unlikely to decrease as a result of the acquisition.

We also consider significant the fact that the population per banking office in the City of Greeley is considerably higher than average. The average population per banking office in Weld County is 5,953 people, whereas in the City of Greeley there is an average of 6,484 persons per banking office as compared with a national figure of 5,751 persons per banking office and a state figure of 9,854. It cannot be said then that either Greeley or Weld County is underbanked.

On the question whether the merger eliminates a potential entrant, we must conclude that it does not. The evidence is uncontradicted that Bancorporation has no intention of entering the Greeley market if this acquisition is disapproved. Greeley is shown by the evidence to be experiencing moderate growth, but not boom growth. This and other objective evidence corroborates the testimony from Bancorporation that it does not intend to enter the market apart from the present acquisition. Furthermore, there is no persuasive evidence in support of the conclusion that Bancorporation is now present on the threshold of the Greeley market and thereby exercises an influence on competition. As pointed out above, Bancorporation has not actively competed in the market and its presence in the wings, so to speak, is not apparent.

There is further objective evidence which supports the finding that there will be no *de novo* or other entry by Bancorporation. Testimony from the State Bank Commissioner indicates that a new state charter would

not be granted because the growth of the area would not justify it. Approval of a national charter by the Comptroller of the Currency is equally unlikely. The Regional Administrator of National Banks testified that he would not recommend any *de novo* entry during the foreseeable future. It further appears that charters have been denied in other areas which are faster growing and where the need would seem to be more apparent. Indeed, Bancorporation's application for a new charter in Montbello, which is on the edge of Denver, was denied, and this fact evidences the difficulty of obtaining approval of a new charter in the Greeley area.

Unquestionably, Bancorporation has the financial capability to enter the Greeley market *de novo,* but the practical difficulties, together with the expense, argue against Bancorporation's following this route. One other possibility has been posed by the government and that is the acquisition of the State Bank of Greeley. However, the objective evidence presented here does not suggest that this is or would be a likely possibility.

We are constrained to conclude then that there is no possibility, at least from the evidence produced at this trial, that Bancorporation will enter the market in the manner recommended by the government and, further, that there is a dearth of evidence to show that Bancorporation has any threshold influence on competition at the present time. It does not appear that it is standing in the wings, so to speak, ready to enter the market and thus serves as a restraining influence on the other institutions in the community, and it cannot be said that its entrance will significantly or

substantially lessen either present or potential competition.

It is finally argued that parallelism and other monopolistic practices are very likely once Bancorporation becomes established. We are mindful, of course, that there are two other holding companies presently in the Greeley market. No evidence whatsoever was presented at the trial which suggests that such practices are being carried on presently, and while we are not prepared to say that FNB Greeley will become an aggressive and vigorous participant in the battle for market shares, we cannot say in all fairness that it will become less competitive than at present.

We have examined the recent decisions of district courts in which the government has sought to obtain injunctions pursuant to Section 7 of the Clayton Act.[9] We have compared the various aspects of these decisions, and we note that notwithstanding that the facts presented by the government were much stronger and more formidable than are the facts in the present case, the government failed to obtain relief in each and every instance. Also, we have carefully considered the decision of the Supreme Court in *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), and the Court's more recent decision in *United States* v. *Phillipsburg National Bank and Trust Company,* 399 U.S. 350, 359-62 (1970). We have sought to apply the stan-

[9] United States v. First National Bank of Jackson, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Idaho First National Bank, 315 F. Supp. 261 (D. Idaho 1970); United States v. First National Bank of Maryland, 310 F. Supp. 157 (D. Md. 1970); United States v. Crocker-Anglo National Bank, 277 F. Supp. 133 (N.D. Calif. 1967).

dards laid down by the Supreme Court in those cases to our facts in an effort to arrive at an accurate and fair decision herein. The main difficulty here is the lack of cogent evidence which even suggests that there is likely to be a lessening of competition as a result of this present acquisition. Nothing has been presented which of itself or considered with the total circumstances serves to make any impact. Nor can we see any so-called triggering effect from the acquisition in question. As heretofore noted, there are several bank holding companies in Colorado, and undoubtedly they will continue to seek acquisitions regardless of the outcome of this case. The case at bar, in any event, must be determined on its individual merits and not in relationship to any future horribles.

IV. Vertical Foreclosure—Lessening of Competition in the Sale of Correspondent Services

The government's secondary line of attack is that the proposed acquisition will substantially lessen competition in correspondent banking in Colorado. The argument is that (1) the lead bank of Bancorporation—FNB Denver—is one of six suppliers of correspondent banking services for Colorado; (2) FNB Greeley is a substantial customer or purchaser of these services in the Colorado correspondent banking market; (3) by acquiring FNB Greeley, FNB Greeley will become a captive customer for FNB Denver's correspondent banking services, Bancorporation will effectively foreclose FNB Greeley and hence this will preclude FNB Greeley from becoming a correspondent banking cus-

er of the five remaining suppliers of correspondent king services in Denver.

here is no judicial recognition of this concept, hence must consider several questions. *First,* does corre- ndent banking (or what plaintiff refers to as a "full xage of correspondent banking services") consti- an appropriate "line of commerce" or product ket within which to measure the substantiality of alleged foreclosure? *Second,* whether the State olorado is an appropriate section of the country or levant geographic market" within which to measure substantiality of any alleged market foreclosure? *rd,* taking into account the appropriately defined ket, will the acquisition and resulting foreclosure stantially lessen competition in the geographically ned product market within the meaning of Sec- 7 of the Clayton Act?

Correspondent Banking as a "Line of Commerce"

ince the competitive aspect is the main concern er the antitrust laws, the market must be defined erms of the product or line of products with respect vhich there is competition. As stated in *Brown e Co.* v. *United States,* 370 U.S. 294, 325 (1962):

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.[10]

[10] Even if it can be said that when the price of coal (for example) high enough, coal users will switch to oil (cross-elasticity), the and inconvenience of doing so would normally place enough of xternal (nonprice) limitation on the demand behavior of coal

Thus, the issue is whether, in the banking industry in Colorado (or the otherwise relevant geographic market), the various correspondent banking services compete with each other within one product market, or whether they form various more or less distinct, product markets? In order to answer this question, an examination of the economic nature of correspondent banking generally and as specifically set forth in the evidence in this case is necessary.

The legal standard for determining the existence, for antitrust purposes, of a line of commerce appears to be that set forth in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962). If commercial banking generally is to be considered a broad line of commerce which includes correspondent banking,

> * * * within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E.I. du pont de Nemours & Co., 353 U.S. 586, 593-595, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the p oduct's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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users that coal and oil will nevertheless continue to exist in separate product markets. On the other hand, if the cost and inconvenience of switching from one type of coal to another type of coal has a relatively insignificant effect on the demand behavior of coal users, the two different types of coal will, in all likelihood, continue to exist in the same product market.

> Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition.

In terms of the criteria in *Brown Shoe, supra,* the evidence presented in this case is somewhat inconclusive as to whether correspondent banking constitutes a separate and distinct product market (or product submarket of commercial banking generally). The testimony did show that there is, within the banking community at least, some recognition of the submarket as a separate economic activity and the alleged "line of products" can be said to have unique production facilities, distinct customers, and specialized vendors. On the other hand, there is no evidence in this case that the "product" has distinct prices or sensitivity to price changes. As to the product's peculiar characteristics and uses, it can be said that the range and diversity of services involved makes it somewhat difficult to classify correspondent banking services as competitive within the same market. At best, the group of services offered varies from bank to bank and the common elements are the demand deposit and the overline loan.

From the fact, however, that the alleged line of commerce (apart from the mentioned elements) is diverse and varies from bank to bank, it does not follow that they cannot be legitimately viewed, in a proper case, as a "line of commerce." The United States Supreme Court has held an equally diverse cluster of banking

products and services—commercial banking generally —to be a line of commerce.[11]

It is noted that the central feature of this alleged line of commerce is the interbank demand deposit, and arguably the larger banks compete for this by offering various services for which little or no charge is made. To this extent only it has the appearance of a line of commerce as the same is defined in *Philadelphia Bank, supra.* But in view of our conclusion that there is not a substantial lessening of competition, we need not decide or comment further.

B. *The Geographic Market*

Plaintiff contends that the relevant geographic market for correspondent banking in Colorado is limited to the State of Colorado. Yet, there is some evidence

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[11] We refer to the statement in United States v. Philadelphia National Bank, 374 U.S. 321, 356 (1963), wherein the Court said:

> We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking," . . . composes a distinct line of commerce. Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. . . . Finally, there are banking facilities which, although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits. In sum, it is clear that commercial banking is a market "sufficiently inclusive to be meaningful in terms of trade realities." . . .

t the Colorado banks which solicit interbank de-
sits and offer correspondent banking services "effec-
ely compete" in a wider area. For instance, The
rst National Bank of Denver regularly travels and
icits interbank demand deposits in areas outside of
lorado including Montana, Wyoming, Nebraska,
nsas, parts of Utah, Idaho, New Mexico, Arizona
l Texas. As a result, FNB Denver generates ap-
ximately 30-40% of its interbank deposits outside of
lorado. For example, as of December 31, 1969, the
2 Colorado bank customers of FNB Denver com-
sed 48.8% of its total of 250 correspondent cus-
ners on that date, and they supplied 69% of the total
$67.6 million in interbank deposits held by FNB
nver as of that date. At the same time, FNB Denver
rried 26 accounts with Wyoming banks, 21 accounts
th Nebraska banks, 14 accounts with Montana banks,
accounts with North Dakota banks, 11 accounts with
nsas banks, nine accounts with New Mexico banks
l nine accounts with banks in Texas.

Plaintiff's argument that areas outside of Colorado
uld be excluded because non-Colorado banks obtain
ver correspondent services from Denver banks is
thout merit. It is conceded that even Colorado banks
not normally obtain a "full package" of corres-
ndent services from any one Denver bank, and, in
y event, we fail to see a relevant distinction between
nks which obtain all of the available correspondent
rvices and those which obtain only some of them.

Plaintiff may have a valid argument in asserting
at only Colorado banks can utilize their Denver cor-
spondent as a depository for bonds or other collateral
hich are required by Colorado law to be posted as

security for deposits of the State Treasurer in Colorado banks. Plaintiff also asserts that only Colorado banks would have a demand for utilizing the expertise of their Denver correspondent for advice on matters peculiar to Colorado law, and that Colorado thus constitutes a substantial geographic submarket.

In view of the fact that the effect of this acquisition on competition is insubstantial under either definition of the geographic market, it is unnecessary to make the precise distinction here asserted by the parties.

C. *Substantiality of the Alleged Foreclosure Effect*

The parties have not presented evidence from which the substantiality of the alleged foreclosure effect can be precisely determined. Plaintiff contends that the amount of correspondent bank balances are the best measure of the amount of correspondent banking business done by banks offering such services. However, the evidence is to the effect that the banks themselves use a much more sophisticated and accurate method of accounting for the correspondent banking transactions in which they engage. FNB Denver, for example, analyzes its larger demand deposit accounts in terms of (1) the income generated by the "average balance" after deducting therefrom the 17½% reserve requirement and the "uncollected funds"—*i.e.*, funds which have been deposited with FNB Denver, but have not yet been collected and are thus unavailable for investment; and (2) the expenses to be charged against the account for services rendered. If at the end of a quarterly accounting period the analysis reveals a loss, FNB Denver generally bills the customer for the excess charges. If the amount of "uncollected funds" was

a constant percentage of the average balance like the 17½% reserve requirement, then the average interbank demand deposit would be an accurate *relative* measure of the degree of foreclosure. However, the evidence indicates that the proportion of "uncollected funds" allocable to various accounts varies from customer to customer. Thus, the gross average interbank balance is at best a very rough, inaccurate approximation of the amount of correspondent banking business done by banks offering such services.

Based on a comparison of interbank demand balances as an acceptable measure of the degree of foreclosure likely to be effected by the proposed acquisition, the foreclosure effect does not appear to be substantial in the context of the banking industry and the particular submarket here involved, however defined. If FNB Denver were to succeed to all of FNB Greeley's correspondent business in FNB Denver's "service area," [12] (and it is not certain that it will succeed to all of it), FNB Denver would gain 7/10ths of one percent of service area correspondent balances. Assuming that Colorado is the relevant geographic market, FNB Greeley's correspondent balances represent only somewhat less than 7/10ths of one percent of the correspondent balances held by Colorado banks (in all banks).[13]

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[12] Major Denver banks have nearly 90% of their sales of bank services to other banks in a service area which includes Colorado, Kansas, Nebraska, New Mexico and Wyoming.

[13] According to plaintiff's statistic, FNB Greeley's correspondent balances represent 1.2% of all such deposits *in the six Denver correspondents* from Colorado banks. This statistic assumes that the market is limited not only to Colorado customers, but to that portion of the Colorado customers' business which remains in Colorado. This percentage, as well, appears to be insubstantial under the circumstances presented by this case.

We have considered cases cited by plaintiff to the effect that foreclosure of a relatively small percentage of a national retail sales or supply market constitutes substantial lessening of competition. None of the percentages are as minimal as those involved here.[14] In any event, a local or regional banking market presents a wholly different competitive situation from a national retail sales or supply market in shoes, chemicals, paper or steel. We are not here dealing with nation-wide giant corporations threatening to take over an entire line of commerce and divide it up between them, and the measure of substantiality must be gauged in the context of the particular industry and market involved.

Plaintiff relies on the fact that there is a statewide trend toward bank acquisition which is bound to produce vertical foreclosure in the correspondent banking market relevant here. But most of the evidence of future acquisitions—particularly as concerns Bancorporation's participation—is based on proposed acquisitions which have either not been approved by the Federal Reserve Board or are presently pending litigation. While we must consider the probable *future* effects of *this* particular acquisition, we must not evaluate the effects of this acquisition by prejudging the merits of pending acquisitions which are not presently before the Court.

In sum, we are unable to conclude, in light of the past trend of bank acquisitions up to this point in

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[14] Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Kimberly-Clark Corp., 264 F. Supp. 439 (N.D. Cal. 1967); United States v. Kennecott Copper Corp., 231 F. Supp. 95 (S.D.N.Y. 1964); United States v. Bethlehem Steel, 168 F. Supp. 576 (S.D.N.Y. 1958).

time, or considering the possible future acquisitions, that the minimal amount of foreclosure which would result from this acquisition constitutes a substantial lessening of competition within the meaning of Section 7 of the Clayton Act. To hold otherwise would serve to automatically preclude an acquisition in *any* instance in which a correspondent relationship had existed or was even potential.

CONCLUSION

Having concluded that the government has failed to sustain its several allegations that the acquisition in question has the effect substantially to lessen competition, or to tend to create a monopoly in a line of commerce in a section of the country as required by Section 7 of the Clayton Act, it follows that the requested relief must be denied and that the complaint and cause of action must be dismissed. It is so ordered.

The Court's findings and conclusions are contained in this opinion, and hence formal findings and conclusions are dispensed with.

The government is granted a stay of proceedings for 30 days. During this period the statutory injunction will remain in force.

DATED at Denver, Colorado, this 12th day of July, A.D. 1971.

BY THE COURT:

/s/ William E. Doyle
WILLIAM E. DOYLE, *Judge*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, PLAINTIFF, *v.* THE FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY, DEFENDANTS.	Civil Action No. C-2413

Filed, Aug. 27, 1971, G. WALTER BOWMAN, *Clerk.*

ORDER

In accordance with the oral opinion rendered by this Court on August 9, 1971, after hearing, regarding the disposition of Plaintiff's *Motion to Re-Open the Record, to Make Additional Findings of Fact and to Amend the Judgment,* dated July 22, 1971, and Plaintiff's *Motion to Extend the Statutory Stay,* dated August 3, 1971;

IT IS HEREBY ORDERED that the aforesaid *Motion to Re-Open the Record, etc.* is denied.

/s/ William E. Doyle
United States District Judge

Dated:

Approved as to form:

/s/ Herbert G. Schoepke
Attorney, Department of Justice
Attorney for Plaintiff

METZGER, SCHWARZ, MCKENNA & KEMPLER

By: Carl W. Schwarz
A Member of the Firm
Attorneys for Defendants

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, PLAINTIFF, *v.* FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY, DEFENDANTS.	Civil Action No. C-2413

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States, under the Expediting Act, 15 U.S.C. Section 29, from the judgment entered July 12, 1971, dismissing the complaint in this action, which became final upon entry of the order of August 27, 1971, denying the timely motion of the plaintiff, United States, to re-open the record, make additional findings of fact and conclusions of law, and grant the relief request in the complaint as amended.

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/s/ Carolyn J. McNeill
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